

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL ENCISO,

Defendant and Appellant.

B212738

(Los Angeles County
Super. Ct. No. BA336234)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Marsha N. Revel, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D.
Martyneec and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and
Respondent.

Raul Enciso was convicted on three counts of corporal injury to a spouse, cohabitant or child's parent (commonly referred to, and referred to hereafter, as domestic violence) (Pen. Code, § 273.5).¹ In a bifurcated proceeding, the trial court found Enciso had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and he had served two separate prison terms for felonies (§ 667.5, subd. (b)). He was sentenced to prison for an aggregate term of 14 years. On appeal, Enciso contends the trial court erred by failing sua sponte to give a unanimity instruction. Alternatively, he claims defense counsel rendered ineffective assistance by failing to request a unanimity instruction if the trial court were not obligated to do so.² We affirm.

¹ Statutory citations are to the Penal Code.

² Enciso raised additional contentions concerning the court's imposition of a domestic violence fine and calculation of presentence custody credits. He subsequently advised this court that these issues were rendered moot following the superior court's nunc pro tunc order of July 14, 2009 and amended abstract of judgment. In a separate order, we deny Enciso's petition for writ of habeas corpus (*In re Enciso*, B220385), which repeats his claim of ineffective assistance of counsel for failing to request a unanimity instruction. Enciso also faults counsel for failing to investigate opportunities to impeach the victim (Delia Perez). He asserts Perez testified she visited Enciso in the county jail following his arrest in this case, but jail records show his only visitor was "Patty Lastra." Enciso maintains Patty Lastra was Perez, who committed fraud to get into the jail (because she had a criminal record and might not have gained entry) and later lied at trial about having done so. Enciso also asserts Perez suggested in her trial testimony that Enciso prevented her from using his cellular telephone, but cellular telephone records show many calls on that phone were hers.

FACTUAL AND PROCEDURAL BACKGROUND

An amended information charged Enciso with committing domestic violence against Delia Perez on September 4, 2007 (count 1), on September 5, 2007 (count 2), and on September 8, 2007 (count 3).³

The pertinent facts are not in dispute. The only issue at trial was whether the victim Perez was telling the truth in reporting to police that beginning on September 4, 2007 she suffered a series of beatings by Enciso at his house, where she was held against her will until September 9, 2007, when she managed to escape.⁴ The defense theory was Perez was so enraged by Enciso's relationships with other women that she decided to blame Enciso for injuries someone else had inflicted.

Perez was reluctant to contact authorities about her injuries until her sister persuaded her to do so on September 11, 2007. Perez spoke to Officer Jennifer Garcia of the Montebello Police Department and described the beatings. Using a calendar to pinpoint the dates, Perez told Garcia that Enciso struck her in her right eye on September 4, 2007 during an argument in his bedroom. On September 5, 2007, they were together in his car; and Enciso said he intended to visit the home of another girlfriend. When Perez retorted that Enciso should stay with that girlfriend, Enciso hit Perez in her left eye. The same day, Enciso argued with Perez in his kitchen and punched her in the chest. On September 8, 2007, Perez was asleep and Enciso began hitting her legs and upper torso to make her get up and cook him breakfast. These assaults caused Perez to suffer two black eyes, and bruises to her left breast, her legs and upper torso, which police photographed. The photographs were admitted into evidence at trial.

On September 13, 2007, Perez refused to talk further with police because she was afraid. Prior to Enciso's preliminary hearing, Perez told the prosecutor that someone

³ During their relationship, Perez and Enciso produced two children.

⁴ Initially, Perez did not appear at trial and her preliminary hearing testimony was read to the jury. After being subpoenaed to testify, Perez failed to appear and was arrested. She was brought to court in custody and testified at trial.

other than Enciso had inflicted her injuries, because, as she later testified, Enciso had told her not to say anything when she visited him in jail in October 2007. Perez acknowledged at trial that she had a prior conviction for petty theft.

Enciso's former wife, Margarita, testified that Enciso physically abused her on several occasions during their relationship.

Enciso did not testify in his defense. His daughter testified that she lived with her father in 2007. Perez had been living in their home for several days as of September 9, 2007. At no time did the daughter witness any trouble between her father and Perez. According to the daughter, Perez claimed to have been injured on September 9, 2007 while fighting with two girls. The daughter did not notice any injuries to Perez at the time, except for some bruising under one of her eyes. A friend of Enciso's daughter also testified that Perez had said she had been in a fight with some girls.

No unanimity instruction was requested or given. During closing argument, the prosecutor argued that Perez had testified that Enciso had caused her to suffer injuries on three separate dates, as charged. "Her testimony was that she received this black eye on September 4th, 2007; that she received the bruising to the side under the bra September 5th, 2007; that she received the bruising to her left thigh, September 8th 2007. The bruising to her left breast, September 5th, 2007. And the black eye to her left eye on September 5th, 2007. [¶] Three different times." Defense counsel argued at length that Perez's testimony was inconsistent and incredible in numerous respects, which showed Perez was lying to punish Enciso for his infidelity.

During deliberations, the jury submitted two written questions: "We request "[Perez's] live testimony by prosecution and public defender" and, "With regard to the dates in the charges, if we do believe that [Enciso] did the crime, but we are uncertain of the dates, what are our options?" The jury was summoned to the courtroom. Responding to the court's request for clarification, the foreperson confirmed in posing the questions, the jury was "trying to figure out what allegedly occurred on what date." The foreperson then asked for all testimony concerning the dates of the alleged incidents to be read back to the jury.

DISCUSSION

A defendant is entitled to a verdict in which all 12 jurors concur beyond a reasonable doubt as to each count charged. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the count must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; *People v. Mota* (1981) 115 Cal.App.3d 227 [““[W]here there are multiple acts placed before a jury, each being a separate chargeable offense in itself, the prosecution must elect the act on which the charge will stand,” or otherwise “the jurors [might] range over the evidence at will and pick out any one of the offense upon which to found its verdict.” [Citations.]”].) The reason for this requirement is that absent an election or a unanimity instruction, when there is more than one unlawful act shown by the evidence, there is the risk that the jurors will select different acts in finding guilt, with none of the acts being chosen by the jurors unanimously. This would violate the constitutionally based requirement that the jury must unanimously agree on each charge. When a unanimity instruction is required, the trial court must instruct on unanimity sua sponte. (*People v. Salvato* (1991) 234 Cal.App.3d 872, 880; see *People v. Hefner* (1981) 127 Cal.App.3d 88, 97.)

But, there is a recognized exception to the requirement of a unanimity instruction. It is not required “when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The ‘continuous conduct’ rule applied when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; accord, *People v. Riel*, *supra*, 22 Cal.4th at p. 1199.) “The continuous course of conduct exception arises in two contexts. [Citations.] ‘The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a

continuous course of conduct of a series of acts over a period of time. [Citation.]’ [Citation.]” (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.)

Enciso contends the lack of a unanimity instruction prejudiced him. He points to various ambiguities and contradictions in Perez’s testimony to argue “the jury could have concluded,” as was suggested by its questions during deliberations, that “Perez did not actually know when or how her various injuries had occurred.” As a result, according to Enciso, “a serious risk existed that the jury simply convicted [him] three times on the basis of a belief that he was the ‘kind of person’ who engaged in domestic violence” rather than on the basis of unanimous factual findings of three separate incidents as charged.

Although Enciso purports to be challenging the trial court’s failure to give a unanimity instruction, his argument reads instead as a challenge to the sufficiency of the evidence.⁵ In any event, no unanimity instruction was required with respect to count 1, in which Enciso was charged with committing domestic violence on September 4, 2007. In support of this count was Perez’s testimony that Enciso engaged in a single criminal act on that date: He hit Perez in her right eye during an argument in his bedroom.

Nor was a unanimity instruction required for count 3, in which Enciso was charged with committing domestic violence on September 8, 2007. Perez’s testimony

⁵ In viewing this as a sufficiency of evidence claim, our role is a limited one. We must consider the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. “Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” [Citation.]’ [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.) Here, the jury’s careful assessment of the nature and veracity of Perez’s account was made obvious by the jury’s questions and requested read-back of all testimony relating to the dates of the charged incidents. Having been found credible by the jury, this evidence was sufficient to support the verdicts.

established on that date Enciso subjected her to a series of punches on her legs and upper torso, which were part of one criminal transaction: a single physical assault.

However, Enciso's contention he was entitled to a unanimity instruction for the domestic violence charge of count 2 has merit. There was evidence he committed two distinct criminal acts on September 5, 2007, either one of which could constitute the crime charged for that date. Perez testified that Enciso struck her in the left eye on September 5, 2007, when they were in his car. She also testified he hit her in the chest the same day while they were in the kitchen. Nothing in the record suggests the "continuous course of conduct" exception to the unanimity requirement would apply to these criminal acts. Perez's testimony failed to suggest the two acts of violence occurred close in time or were not separated by intervening acts. Thus, unlike the punches to Perez's legs and upper torso on September 8, 2007, there is nothing factually to indicate Enciso's acts of striking Perez in her left eye and chest on September 5, 2007 formed a continuous course of conduct, as it would, for example, had Perez testified Enciso began beating her in the car outside his house, before pursuing her into the kitchen, where he continued his assault by striking her chest.⁶ (See, e.g., *People v. Jenkins*, *supra*, 29 Cal.App.4th at pp. 299-300.) We cannot conclude the two criminal acts were so closely connected that they formed part of one and the same transaction, and thus one offense, obviating the need for a unanimity instruction as to count 2.

It is true, as the People argue, that domestic violence has been held to be one of those statutory offenses which, because the ongoing nature of the crime, contemplates a continuous course of conduct or a series of acts over a period of time. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 225-226; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1526 ["This second category of the continuous course of conduct exception has been applied to a limited number of varying crimes, including pimping [citation], pandering [citation], failure to provide for a minor child [citation], contributing to the

⁶ Our example assumes Perez was struck in the left eye prior to being struck in chest breast. However, it is not clear from the record, which criminal act occurred first.

delinquency of a minor [citation], and child abuse [citation]. [¶] To this exemplary list could be added spousal battery [citation], annoying or molesting a child [citation], acting as accessory to a felony [citation] and dissuading a witness from testifying [citation]. [Citation.]”.) The problem here is the crime was neither charged nor litigated as a continuous course of conduct offense. Rather than accuse Enciso of committing various instances of domestic violence against Perez on and between September 4, 2007 and September 8, 2007, the prosecution linked specific instances of domestic violence to specific dates as different counts. (Compare *People v. Thompson*, *supra*, 160 Cal.App.3d at p. 222 [defendant was charged with domestic violence during the period of January 1, 1981 to January 21, 1981].)

Nonetheless, any error in failing to give a unanimity instruction in connection with count 2 was harmless beyond a reasonable doubt. Enciso gave the jury no reason to distinguish between the two acts of hitting Perez in the left eye and hitting her in the chest, and thereby to believe that one but not the other occurred. Enciso asserted only one defense at trial—that Perez lied to police and in court proceedings, and in truth Enciso did not commit any of the violent acts Perez attributed to him. The jury obviously rejected that defense as evidenced by its guilty verdicts. (See, e.g., *People v. Riel*, *supra*, 22 Cal.4th at p. 1199.) We thus conclude a unanimity instruction was not applicable to counts 1 and 3, and any error in failing to give this instruction as to count 2 was necessarily harmless.⁷

⁷ In light of our decision, we need not address Enciso’s alternative claim defense counsel rendered constitutionally ineffective assistance by failing to request a unanimity instruction if the trial court were not obligated *sua sponte* to give it.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.